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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**

7 THE REGENTS OF THE
8 UNIVERSITY OF CALIFORNIA,
9
10 vs.
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12 PAUL S. AISEN, et al.,
Defendants.

CASE NO. 15-cv-1766-BEN (BLM)

**ORDER DENYING PLAINTIFF'S
MOTION FOR CONTEMPT
SANCTIONS**

13 **I. INTRODUCTION**

14 Now before the Court is the Plaintiff's Motion for Contempt Sanctions, or in
15 the Alternative for Issuance of an Order to Show Cause Re Contempt Against
16 Defendants Aisen, Jimenez-Maggiora, and University of Southern California.
17 Plaintiff alleges that these Defendants have not complied with the directions in the
18 preliminary injunction issued on August 4, 2015.¹ Plaintiff asserts that, "more than
19 three months after the issuance of the [preliminary injunction order], Defendants
20 have utterly failed and refused to comply with its plain terms." Mot. for Contempt,
21 at 2. Defendants deny the claim. Plaintiff has not carried its burden. Therefore, the
22 motion for contempt sanctions is denied.

23 **II. APPLICABLE LAW**

24 The force and vitality of a judicial decree derives from robust sanctions.
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27 ¹The parties are familiar with the events leading up to this litigation and the
28 contents of the preliminary injunction order issued by the Superior Court of California.
There is no dispute that the preliminary injunction entered by the state court continued
in full force when the case was removed to this Court, pursuant to 28 U.S.C. § 1450.

1 *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1947). Courts have
 2 inherent power to enforce compliance with a lawful order through the mechanism of
 3 civil contempt. *Spallone v. United States*, 493 U.S. 265, 276 (1990). In the Ninth
 4 Circuit, the test of whether a party is in contempt of a court order is clear: “[t]his
 5 Circuit’s rule with regard to contempt has long been *whether the defendants have*
 6 *performed ‘all reasonable steps within their power to insure compliance’* with the
 7 court’s orders.” *Stone v. City and Cnty. of S.F.*, 968 F.2d 850, 856 (9th Cir. 1992)
 8 (emphasis added). The steps to be performed must be within a defendant’s power,
 9 and the steps must be a reasonable step to take.

10 Plaintiff asserts that defendants Paul S. Aisen, M.D., Gustavo Jimenez-
 11 Maggiora, and the University of Southern California have failed to take all
 12 reasonable steps to comply with the preliminary injunction order. Plaintiff is the
 13 moving party. Therefore, the plaintiff has the initial burden.

14 The plaintiff’s burden is to show by *clear and convincing evidence* a
 15 violation of the order.² The violation must be of *a specific and definite order* of the
 16 court. *Id.* at n.9 (“The moving party has the burden of showing by clear and
 17 convincing evidence that the contemnors violated a specific and definite order of
 18 the court.”) (citation omitted). If the moving party (in this case, the plaintiff)
 19 satisfies its burden of showing, then the burden shifts to the purported contemnors.
 20 The purported contemnors then have the burden “to demonstrate why they were
 21 unable to comply.” *Id.* Put differently, the purported contemnors may show “they
 22 took every reasonable step to comply.” *Id.*

23 **III. THE PRELIMINARY INJUNCTION ORDER**

24 The difficulty with this type of case stems from the medical delicacy and

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 26 ²Exhibits placed in the record are plentiful. Plaintiff’s motion includes 384
 27 pages of exhibits and often refers to exhibits found among 3,112 pages attached to the
 28 Notice of Removal and 324 pages of its Opposition to Defendants’ motion to modify. For its own part, the opposing parties include 386 pages of their own exhibits. Most of these exhibits, however, have little direct significance on the question of contempt.

1 technological complexity of the Alzheimer’s Disease Cooperative Study (“ADCS”)
2 Data and Systems which is the subject of the preliminary injunction order.
3 Contempt requires disobedience to an order that is *specific and definite*, but the
4 preliminary injunction order contains few specific and definite directions. The
5 preliminary injunction order was crafted in such a way as to safeguard from
6 destruction a significant public resource: longitudinal medical research and its
7 informational databases about treatments for Alzheimer’s Disease. Because the
8 informational databases include computer data files, they must be managed by
9 experts in digital technology. Because the studies are ongoing, disruptions in data
10 access or loss of data may have serious adverse impacts on Alzheimer’s patients.

11 While the preliminary injunction order contemplates restoration to the status
12 quo ante, it also recognizes that restoration must be accomplished through a careful
13 and deliberate process. PI Order at ¶2 (“The gathering, sorting, storage, analysis
14 and management of data are all essential aspects of the Alzheimer’s Disease
15 Cooperative Study (ADCS). In order to maintain the status quo, these functions
16 must be performed to avoid the likelihood of damage to the study and to enable the
17 study to continue to move forward to achieve its stated goals.”). That takes
18 deliberation. Deliberation takes time. The preliminary injunction order takes
19 special care to avoid a hasty operation that may kill “the patient.” It orders
20 Defendants to restore management and control to Plaintiff “employ[ing] all
21 deliberate speed. . . .” *Id.* at ¶1. To that end, a Special Master was appointed to
22 oversee the process and a medical expert was appointed to lend assistance to the
23 Special Master. The Special Master is authorized to seek the Court’s assistance.
24 And the Special Master has sought clarification of the preliminary injunction order.
25 This motion for contempt was filed, however, before the Court responded to the
26 Special Master’s clarification request.

27 Further complicating the picture, the preliminary injunction order anticipates
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1 change. It anticipates that a study sponsor (the term “third party” is used in the text)
 2 may assign its rights to obtain access, custody, or control over the ADCS data, and
 3 it may assign its rights to the Defendants. *Id.* It appears that five of the six major
 4 study sponsors did make that change early on. The result is a complex web of legal
 5 relations which require the precision of a scalpel. Plaintiff does not make its case
 6 by simply claiming contempt. Here, the alleged contemnors may be acting
 7 legitimately on behalf of other rights-holders while maintaining custody and control
 8 over ADCS data.

9 Medical research is complicated. Large scale data management is
 10 complicated. Courts are not well-equipped with expertise in medicine or
 11 information technology. For example, this Court has never seen a “Github” or
 12 carried anything in a “Bitbucket.” Yet, the Court has fashioned a preliminary
 13 injunction that attempts to transfer access for the ADCS Data and Systems, its
 14 Amazon Clouds, Githubs, and Bitbuckets, without destroying the on-going research.
 15 Questions are inevitable.

16 IV. CLARIFICATIONS OR MODIFICATIONS

17 Defendants have done what the Supreme Court teaches: when questions arise,
 18 seek clarification or modification from the issuing court. *McComb v. Jacksonville*
 19 *Paper Co.*, 336 U.S. 187, 192 (1949) (“Yet if there were extenuating circumstances
 20 or if the decree was too burdensome in operation, there was a method of relief. . . .
 21 Respondents could have petitioned the District Court for a modification,
 22 clarification or construction of the order.”); *Regal Knitwear Co. v. NLRB*, 324 U.S.
 23 9, 15 (1945) (“If defendants enter upon transactions which raise doubts as to the
 24 applicability of the injunction, they may petition the court granting it for a
 25 modification or construction of the order.”). Defendants filed a motion for
 26 clarification or modification not long after questions were raised by the Special
 27 Master. The motion for contempt, however, was filed before the Court resolved the
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1 Defendants' motion. "[C]ourts no less than parties desire to avoid unwitting
2 contempts, as well as to punish deliberate ones." *Regal*, 324 U.S. at 15.

3 To sum up, in a civil contempt motion, "the moving party has the burden of
4 showing by clear and convincing evidence that the contemnors violated a specific
5 and definite order of the court." *Federal Trade Comm'n v. Enforma Natural*
6 *Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004) (citations omitted). Plaintiff has
7 not carried its burden. To see why the movant's burden has not been met, some
8 examples will suffice.

9 V. PARTICULAR CLAIMS OF CONTEMPT

10 Plaintiff's first claim of contempt with a supporting document begins at page
11 eight of the motion. Plaintiff asserts, "[a]t no point have Defendants complied with
12 the [preliminary injunction order], or even proposed any plan or timetable for
13 Defendants to 'return full system and data access, control and management of the
14 ADCS Data and Systems to UCSD' as required by paragraph 1 of the Order." Mot.
15 for Contempt, at 8. Plaintiff cites in support a declaration of Plaintiff's own lead
16 attorney, J. Daniel Sharp, Esq. There is no other evidence offered. A strong case
17 would present declarations from knowledgeable disinterested persons. Those
18 persons would have knowledge of the time necessary and the medical-technological
19 expertise necessary to actually accomplish the return of the ADCS Data and
20 Systems as defined by the order. They would then opine about whether the process
21 could have been completed sooner, if done with deliberate speed and without
22 risking the integrity of the medical studies or the health of the patients in the
23 studies. If the evidence was sufficient, the burden would then shift to the alleged
24 contemnors. The declaration by movant's own counsel does not make a strong case
25 here.

26 Plaintiff next asserts contempt because "Defendants have demanded
27 continued access to the ADCS Data and Systems." *Id.* at 8-9. Plaintiff again cites
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1 the Sharp declaration. The problem is that the preliminary injunction order does not
2 preclude Defendants from simply having access. The order presumes Defendants
3 have access. The preliminary injunction orders that system and data access be
4 returned to Plaintiff; it does not prohibit Defendants from having initial access or
5 maintaining access. Moreover, it does not preclude a study sponsor from assigning
6 its own access rights to Defendants. Thus, the claim that Defendants seek
7 continuing access, even if proven, does not prove a contemptuous violation of the
8 order.

9 Plaintiff next asserts that Defendants are in contempt because Defendants
10 “demanded this access for the express purpose of using the Data and Systems to
11 ‘continue running the studies.’” *Id.* at 9. Plaintiff cites the Sharp declaration.
12 Again, the preliminary injunction order does not prohibit the defendants from
13 running studies or accessing the study data. Instead, it requires the essential aspects
14 of the study (the ‘gathering, sorting, storage, analysis and managements of data’) to
15 continue to be performed to avoid damage to the ADCS study. Thus, the assertion,
16 if true, does not evidence contempt.

17 Plaintiff next asserts that the Special Master requested a proposal to
18 effectuate the transfer of control of the ADCS Data and Systems, but that the
19 Defendants proposal of a “ring fence” was arguably in conflict with the preliminary
20 injunction order. The Special Master did observe that the ring fence proposal
21 “arguably conflicts” with the order. This is one subject of the Special Master’s
22 request for court assistance and Defendant’s motion for clarification. Much more
23 than the existence of a genuine question is required to show a clear and convincing
24 contempt of court.

25 Plaintiff next asserts that defense *counsel* has “acted affirmatively to exclude
26 UCSD” because counsel “advocated” with the Special Master to prevent Plaintiff
27 from accessing a Github account containing information that is part of the ADCS.
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1 The preliminary injunction order includes mention of web-based data repositories
 2 such as Github and Bitbucket. But the preliminary injunction order placed the
 3 Special Master in charge of the delicate process of transferring management and
 4 control of the data and system used for the ADCS. The attorney advocacy to which
 5 Plaintiff refers appears to be an early request to the Special Master to ensure the
 6 Github control was part of the Special Master's planned transition process. The
 7 advocacy was apparently triggered by what appeared to possibly be Plaintiff's own
 8 self-help efforts to re-take Github control outside the process. Decl. of J. Daniel
 9 Sharp in Supp. of Opp'n. to Defs.' Mot. to Clarify or Modify the Prelim. Inj. (filed
 10 9/29/15), Ex. A (Dkt. #31-4 at 6). It is easy to see that this is not clear and
 11 convincing evidence of Defendants' contempt.

12 Plaintiff asserts that Defendants "violated the [preliminary injunction order]
 13 by refusing UCSD's request of documentation and information about the ADCS
 14 Data and Systems." Plaintiff cites in support Sharp's email communication of
 15 8/20/15 to defense counsel.³ Plaintiff then cites part of defense counsel's response

17 ³ Sharp's email states, "...listed below is a summary of items that UCSD would
 18 like to request as an initial priority from a technical perspective." The language of the
 19 email is difficult to understand by those not well-versed in the techno-jargon of
 information technology:

20 1. Access to all the latest code repositories. This includes git/mercurial repositories
 21 stored in GitHub/Bitbucket and/or other locations. This also includes all branches in
 22 each repository as well as any forks that were made to other GitHub/Bitbucket
 23 accounts. Although USC provided a version of some of the code, it doesn't seem to be
 24 the latest version of the code and it doesn't include a commit history that would contain
 25 more information about how the code was architected over time. We should be given
 administrator access to the GitHub/Bitbucket accounts, similar to what we received for
 Amazon. In addition to all the repositories, it would be prudent to have from
 Defendants a description of each repository's contents, its purpose and whether it
 contains sensitive information that may damage the studies. If our access will damage
 the studies, we want to specifically know why. In general if the study integrity alarm
 is raised moving forward in response to any request, we need to know specifically why
 this is a concern.

26 2. A detailed description of all the systems and their interactions, described using
 27 visual flow diagrams. We want this so we may understand once and for all where all
 28 the systems are and how they interact. This includes systems hosted at AWS, SDSC,
 ADCS, Google, GitHub/Bitbucket and anywhere else we may not know about. We
 would want information not only on the system contents and specs, but also the user

1 of 8/26/15 (*i.e.*, “[w]e never agreed to provide all of the information requested in
2 Mr. Sharp’s email and we were never directed to do so”). Defense counsel’s email
3 response goes into more explanation for why and notes that most of the requested
4 information was already within UCSD’s ambit.⁴ This is not clear and convincing
5 evidence of contempt.

6 Plaintiff asserts that Defendants refused to discuss the Special Master’s
7 proposal for a path forward. Plaintiff again cites attorney Sharp’s own declaration
8 and a string of emails between the Special Master and counsel for both parties.
9 Without repeating all of the discussions relayed by the emails, it is clear from the
10 email string that defense counsel was, in fact, discussing the proposed path forward
11 in a manner in which one would expect counsel to discuss an important proposal.

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13 accounts, credentials, access levels and protocols used by each. This includes the
14 direction of the interactions as well as full list of automated or manual processes that
15 are required to maintain them. Which systems send out automatic notifications and for
16 what purposes is also important. Claudiu put together quickly some examples of what
17 we mean by visual flow diagrams (see attached).

18 3. Login credentials to and detailed descriptions of the TCAD test/dev environments.
19 We want this because we want to begin understanding right away how this study is
20 configured using the EDC so we may best maintain it when we receive it. We would
21 also want a description of all the EDC modules (including versions and their location
22 in the code repositories) in use by the TCAD portal as well and assurances that gaining
23 access to the test/dev environments for TCAD will not damage study integrity. Again,
24 if gaining access will endanger study integrity, we want to know specifically why so
25 that we may avoid this risk as expediently as possible. We will eventually want
26 credentials and descriptions for all study EDCs, but TCAD is the priority due to
27 obvious reasons (Toyama has repeatedly confirmed that it will not move the TCAD
28 study from UCSD).

4. A detailed description of the contents of the safe at ADCS, as well as the
combination to open it should we need access. We want this so that we have complete
access to everything physically stored at the ADCS should we need it.

5. A detailed history of all the Part11/HIPAA/etc. audits done of the EDC/CTMS/
ADCS by third parties over the history of the ADCS. We want this because no one
remaining at the ADCS as far as I can tell knows exactly what was done in this
regard and it is critical on many levels to know these facts precisely.”

⁴ “The proposal we submitted is exactly the proposal we agreed to submit at the
end of our call on August 20th. We never agreed to provide all of the information
requested in Mr. Sharp’s email and we were never directed to do so. We have already
provided a list of all of the documentation that UCSD has access to which covers most
of the information requested. Our proposal is intended to implement the remaining
aspects of the Court’s order in an orderly manner, while preventing unreasonable risk
of harm to the continuation of the studies, as the Court directed.”

1 See Decl. of J. Daniel Sharp in Supp. of Opp'n. to Defs.' Mot. to Clarify or Modify
 2 the Prelim. Inj. (filed 9/29/15), Ex. D (Dkt. #31-4 at 28-38). This is not clear and
 3 convincing evidence of contempt.

4 Plaintiff asserts that Defendants "refused to comply in any way" with a
 5 September 5, 2015 directive of the Special Master. Plaintiff cites Exhibit E to
 6 attorney Sharp's declaration. Exhibit E is another email string; this time the emails
 7 are between counsel and the Special Master. Defense counsel writes only that he is
 8 discussing the implications of the directive with his client, not that his clients are
 9 refusing to comply. This is not clear and convincing evidence of contempt.

10 Plaintiff asserts that defendant Jimenez-Maggiore violated paragraph two of
 11 the preliminary injunction order by copying some files from "adcs-adni2.iadcs.org."
 12 Plaintiff does not specify the specific and definite part of the order allegedly
 13 violated. Paragraph two of the preliminary injunction order does not mention "adcs-
 14 adni2.iadcs.org," nor is it mentioned in any other place of which the Court is aware.
 15 The preliminary injunction order does prohibit Defendants from "exercising
 16 dominion, custody, and control over the ADCS Data and Systems." Assuming for
 17 the moment that data files found at "adcs-adni2.iadcs.org" are part of the ADCS
 18 Data and Systems, Plaintiff assumes without citation that the action of copying files
 19 would be a contemptuous exercise of dominion, custody, and control.⁵ In support,

21 ⁵ The terms "dominion," "custody," and "control" are words that have long been
 22 associated with the common law tort of conversion or trover. Conversion, in turn, has
 23 historically applied to tangible things (*i.e.*, chattel). *Kremen v. Cohen*, 327 F.3d 1024,
 24 1030 (9th Cir. 2003). One who exerts authority over another's physical property – a
 25 barrel of flour for instance – and delivers it to another, dispossesses the true owner and
 26 prevents the true owner from selling the barrel of flour. *E.g.*, *Vasse v. Smith*, 10 U.S.
 27 (6 Cranch) 226, 232-233 (1810) (defendant converted 70 barrels of flour by shipping
 28 the barrels out of the country to a third person not authorized by the owner). That
 person can be said to have exercised dominion, control, and custody of the flour barrel
 and converted it to his own use. *Id.*

Suppose, however, that the barrel of flour could be copied like a data file? If the
 true owner can still use or sell his flour barrel and the flour is not diminished, if the
 original flour barrel is not interfered with in any way, can the person with the duplicate
 barrel of flour be said to be exercising dominion, custody, and control over the original
 flour barrel? In other words, does copying a data file without more, constitute the

1 Plaintiff cites attorney Sharp's own declaration (¶¶ 14 & 15, which, in turn, cites as
 2 an exhibit a letter that attorney Sharp sent to defense counsel and a letter from
 3 defense counsel to Sharp).

4 The evidence offered indicates that Defendant Jimenez-Maggiora
 5 communicated with William Mobley, M.D., of UCSD, on August 25, 2015.
 6 Defendant Jimenez-Maggiora advised Mobley that he intended to copy
 7 approximately 25 "datasets," listing them by name. See Decl. of J. Daniel Sharp in
 8 Supp. of Opp'n. to Defs.' Mot. to Clarify or Modify the Prelim. Inj. (filed 9/29/15),
 9 Ex. G (Dkt. #31-4 at 51-60). The datasets are described as a subset of the ADNI
 10 dataset and a compressed copy of the copied files was attached to a follow-up email
 11 to Mobley. *Id.* Defense counsel's letter thereafter explained that the copied files
 12 were part of the collection of ADNI study data. See Decl. of J. Daniel Sharp in
 13 Supp. of Opp'n. to Defs.' Mot. to Clarify or Modify the Prelim. Inj. (filed 9/29/15),
 14 Ex. H (Dkt. #31-4 at 62-63). The ADNI study, in turn, is a project of NCIRE which
 15 has transferred its research contract to Defendants Aisen and USC, according to the
 16 letter. *Id.* If this is true (and Plaintiff identifies no evidence to the contrary), then
 17 the preliminary injunction order specifically excepts such acts of access, custody, or
 18 control. Paragraph 1 of the order explains, "[t]his order does not determine the
 19 rights of third parties, and shall not be construed to preclude any third party [such as
 20 NCIRE] from assigning to Defendants any rights that such third parties may have to
 21 obtain access, custody, or control over ADCS data." The evidence suggests this is
 22 exactly what happened with the copying of files from "adcs-adni2.iadcs.org," and
 23 the copying was consistent with the preliminary injunction order. In other words,
 24 this is not clear and convincing evidence of contempt.

25 As a final example, Plaintiff contends that a letter from USC to the ADCS

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 27 exercise of dominion, custody or control over the original data file? The motion
 28 assumes without discussion that copying data *does* constitute exercising dominion,
 custody and control.

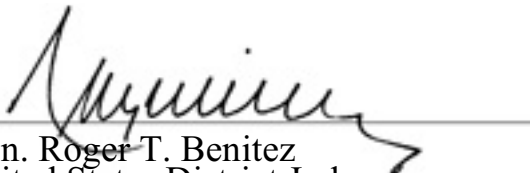
1 Steering Committee dated October 2015 “is proof that Defendants are willfully
2 refusing to comply with the [preliminary injunction order]. . . .” The letter,
3 however, appears to be a defensive explanation describing how Defendants, on the
4 contrary, have complied with the preminary injunction and are trying to protect
5 the safety and fidelity of the Alzheimer’s research data while attempting to work
6 with UCSD officials. See Decl. of J. Daniel Sharp in Supp. of Mot. for Sanctions
7 (filed 11/16/15), Ex. F (Dkt. #51-4). Like the other examples, it is not clear and
8 convincing evidence of contempt.

9 VI. CONCLUSION

10 To borrow a phrase: contempt of a court order is a serious charge, and
11 requires serious proof. *United States v. Castro-Ponce*, 770 F.3d 819, 823 (9th Cir.
12 2014) (“Obstruction of justice is a serious charge, and requires serious proof.”).
13 And not just serious proof, but clear and convincing proof. *Stone*, 968 F.2d at 856
14 n.9. And the movant must prove contempt of *a specific and definite order*. *Id.*
15 Plaintiff has not carried its burden.

16 As mentioned above, medical research is complicated and large scale data
17 management is complicated. Questions are inevitable and deliberation takes time.
18 Defendants have taken an acceptable course by continuing to communicate with the
19 Special Master and seeking clarification or modification from the Court in view of
20 changed circumstances – a change in circumstances anticipated in the preliminary
21 injunction order. Plaintiff has cited no similar case where contempt sanctions were
22 imposed. The motion for contempt sanctions is denied.

23 DATED: September 6, 2016

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25 
26 Hon. Roger T. Benitez
27 United States District Judge
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